NO. 48543-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ISAAC JOSEPH QUITIQUIT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00021-5

BRIEF OF RESPONDENT

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SERVICE		
	Christopher H. Gibson 1908 E Madison Street Seattle, WA 98122 **Email: gibsonc@nwattorney.net**	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 3, 2016, Port Orchard, WA  **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Quitiquit's right to a fair and impartial jury verdict was violated when the trial court properly instructed the jury on its duty to deliberate and there is no constitutional error that had an identifiable consequence on the trial?

2. Whether the trial court erred in sentencing when the combined sentence of confinement and community custody exceeded the statutory maximum of five years? [CONCESSION OF ERROR]

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Isaac Joseph Quitiquit was charged by information filed in Kitsap County Superior Court with two counts of rape of a child in the third degree. CP 5-6. A jury found Quitiquit guilty of both counts. CP 36. The trial court imposed a sentence of 34 months concurrent on both counts and 36 months of community custody. CP 37-46.

B. FACTS

Quitiquit is the uncle of E.U. and lived in a house in Silverdale, Washington, sharing a duplex with E.U.'s grandparents. RP (12/15) 234-235. In June 2013, Quitiquit began attending E.U.'s church and the relationship between the two became closer. RP (12/15) 236-238. They started spending time together outside of church and E.U. started spending

the night at Quitiquit's house in December 2013. RP (12/15) 238-239. By May 2014, they were sharing a bed at night. RP (12/15) 240-241.

On May 31, 2014, E.U. was spending the night at Quitiquit's home, sleeping in his bed. RP (12/15) 241. That night, he put his fingers in her vagina and performed oral sex on her. RP (12/15) 242-243. About a week later, E.U. spent the night at Quitiquit's house. RP (12/15) 247-251. That night, Quitiquit again put his fingers in her vagina. RP (12/15) 253-254. He then had her go into the bathroom where he shaved her pubic hair off while she was naked in his tub. RP (12/15) 254-256. E.U. was 14 years old at the time of both incidents. RP (12/15) 245-246.

E.U. eventually disclosed what had happened to her counselor, Myrna Hill, who reported the matter to law enforcement in November 2014. RP (12/15) 261, 200-201. Detective Gerald Swayze of the Kitsap County Sheriff's Office wrote and served a search warrant on Quitiquit's home on December 11, 2014. RP (12/14) 57-58. Hairs from the edge of the bathroom and the floor between the bathroom and toilet were collected and sent to the Washington State Patrol Crime lab along with a reference DNA sample from E.U. RP (12/14) 60-61. There were no roots on the hairs, so they could not be tested for DNA. RP (12/14) 127-128.

III. ARGUMENT

A. QUITIQUIT WAS NOT DENIED HIS CONSTIUTIONAL RIGHT TO A FAIR AND UNANIMOUS JURY VERDICT BECAUSE THE JURY WAS PROPERLY INSTRUCTED ON ITS DUTY TO DELIBERATE AND HE CANNOT POINT TO AN ERROR THAT RESULTED IN ACTUAL PREJUDICE AND HAD AN IDENTIFIABLE CONSEQUENCE IN THE TRIAL.

Quitiquit argues that he was denied his constitutional right to a fair trial and a unanimous jury verdict because the trial court failed to instruct the jurors that deliberations must include all jurors at all times. This claim is without merit because it is an unpreserved error that is based on pure speculation.

RAP 2.5 states that the appellate court may refuse to review any claim of error that was not raised in the trial court. A party may raise a claim of error for the first time in the appellate court under three exceptions, one of which is manifest error affecting a constitutional right. In order to prove that such an error occurred, the defendant must "identify the constitutional error and show that it actually affected his or her rights at trial. The defendant must make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

Quitiquit argues that the jury instructions given failed to make it clear that the deliberations must involve all jurors. He claims that because this was not clear in the given instructions, the jurors were not prohibited from splitting up into groups for each count with the understanding that each group would agree with the verdict reached by the other. Quitiquit posits that it was reasonably probable that the jurors did just this. Further, under Quitiquit's reasoning, it is likely that a juror could have left the room to use the bathroom and was therefore deprived of the discussion. Therefore, Quitiquit concludes that it was reasonably probable that the jurors here discussed the case without everyone present.

Quitiquit's argument fails. Here, the trial court provided the jury with the following standard jury instruction:

> As jurors, you have a duty to discuss the case with one another in an effort to reach a unanimous verdict. Each of you must decided the case for yourself, but only after you consider the evidence impartially with your fellow jurors.

CP 23. The constitutional issue is not with the jury instruction, which was properly given—rather, Quitiquit must show that there was an identifiable issue with the jury's behavior that had an impact on the outcome of the trial.

Quitiquit relies on *Lamar*, which is clearly distinguishable. In that case, the jurors began deliberations on a Friday after being instructed about their duty to deliberate together in an effort to reach a unanimous

verdict. The following Monday, one of the jurors was excused because of illness, so an alternate came in as a replacement. *Lamar*, 180 Wn.2d at 580-81. The court told the jury that they should review their Friday deliberations with the other juror, but did not instruct the jury on their duty to deliberate together in an effort to reach unanimity or that they must begin deliberations anew. *Lamar*, 180 Wn.2d at 581. By instructing the jury in this manner, the trial court essentially told the jury not to deliberate together. *Lamar*, 180 Wn.2d at 582. In *Lamar*, this error had practicable and identifiable consequences in the defendant's trial because, if that instruction was followed, "the effect was to bar the reconstituted jury from deliberating together on all aspects of the case against him." *Lamar*, 180 Wn.2d at 585.

The deliberation instruction given to the jury here is identical to the jury instruction given to the original jury in *Lamar,* which was not at issue. Rather, the concern of the *Lamar* Court was the instruction given by the court after the new juror joined. Here, no new juror was introduced—the entire jury deliberated together and came to a verdict. There is no evidence on the record that Quitiquit can point to that would amount to practicable and identifiable consequences that had an impact on the trial.

Quitiquit further claims that because the trial court did not instruct

the jury after every recess, then it was possible that they did not deliberate together the entire time. Again, this is pure speculation. While the trial court may not have instructed the jury at every break, there is nothing on the record that would support Quitiquit's conclusion that this had an impact on jury deliberation. Quitiquit's cannot show any actual prejudice that had an identifiable impact on the outcome of the trial.

B. THE STATE AGREES THAT THE TRIAL COURT SHOULD HAVE SENTENCED QUITIQUIT SO THAT THE COMBINED TIME OF CONFINEMENT AND COMMUNITY CUSTODY DID NOT EXCEED THE STATUTORY MAXIMUM OF FIVE YEARS.

Quitiquit next claims that the trial court erred by failing to insure that his sentence did not exceed the statutory maximum of five years. Quitiquit was convicted of two counts of rape of a child in the third degree. CP 36. At sentencing, he was facing a range of 26 to 34 months on each count. CP 38. The trial judge sentenced Quitiquit to 34 months on each count to run currently, along with 36 months of community custody. RP (1/15) 27.

RCW 9.94A.701 governs how much community custody certain crimes carry if an offender is sentenced to a prison term. If an offender's standard range of confinement, when combined with his community custody, exceeds the statutory maximum, the court shall reduce the

community custody term. RCW 9.94A.701(9). The court cannot impose an aggregate term of community custody and confinement that goes beyond the statutory maximum. *State v. Hernandez,* 185 Wn. App. 680, 342 P.3d 620 (2015). The proper remedy is to remand the case to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 231 (2012). The State concedes that the case should be remanded to the trial court for resentencing consistent with RCW 9.94A.701(9).

IV. CONCLUSION

For the foregoing reasons, Quitiquit's conviction should be affirmed and remanded to the trial court for resentencing.

DATED November 3, 2016.

Respectfully submitted,

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